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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 TUCSON DIVISION**

| | | |
|---|---|------------------------------|
| Center for Biological Diversity; and |) | Case No. CV-20-00075-TUC-SHR |
| Maricopa Audubon Society, |) | |
| |) | STIPULATED SETTLEMENT |
| Plaintiffs, |) | AGREEMENT |
| |) | |
| v. |) | |
| |) | |
| Scott de la Vega, Acting Secretary of the |) | |
| Interior; |) | |
| U.S. Fish and Wildlife Service; and |) | |
| U.S. Forest Service, |) | |
| |) | |
| Federal Defendants, |) | |
| |) | |
| and, |) | |
| |) | |
| Arizona Cattle Growers' Association; |) | |
| Barbara and William Marks; and Doug |) | |
| Stacy, |) | |
| |) | |
| Intervenor-Defendants. |) | |

1 This Stipulated Settlement Agreement is entered into by and between Plaintiffs
2 Center for Biological Diversity and Maricopa Audubon Society (hereafter “Plaintiffs”),
3 and Federal Defendants Scott de la Vega, Acting Secretary of the Interior, United States
4 Fish and Wildlife Service, and United States Forest Service (hereafter “Federal
5 Defendants”) (collectively, “the Parties”), who state as follows:

6 WHEREAS Plaintiffs filed their “Complaint for Declaratory and Injunctive
7 Relief,” ECF No. 1, on February 20, 2020;

8 WHEREAS Plaintiffs’ Complaint alleges that Federal Defendants have violated
9 various provisions of the Endangered Species Act (“ESA”) and the National Forest
10 Management Act (“NFMA”) in relation to the United States Forest Service’s
11 administration of the Apache-Sitgreaves National Forest and impacts to the endangered
12 New Mexico Meadow Jumping Mouse;

13 WHEREAS the Wallow Fire of 2011 destroyed much of the boundary fence
14 between the Fort Apache Indian Reservation to the west and the Apache-Sitgreaves
15 National Forest to the east, as depicted in Attachment A;

16 WHEREAS the Forest Service has reconstructed approximately 14 miles of the
17 19-mile boundary fence with the Fort Apache Indian Reservation, from the Black River
18 north to Reservation Lake, to limit unauthorized livestock from entering National Forest
19 System lands;

20 WHEREAS the Forest Service has an existing contract to reconstruct
21 approximately 2.25 miles of additional boundary fence from Reservation Lake north to a
22 location just south of Thompson Creek that the Forest Service anticipates will be
23 completed by June 30, 2021;

24 WHEREAS the Forest Service has not secured funding to reconstruct the
25 remaining approximately 2.75-mile stretch of the boundary fence from Thompson Creek
26 north to a natural boundary against the Baldy Wilderness;
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1 WHEREAS Plaintiffs have indicated an interest and intention to assist the Forest
2 Service in obtaining funding to reconstruct the remaining approximately 2.75-mile stretch
3 of boundary fence, and the Regional Office has made securing such funding (from both
4 internal and external sources) a priority;

5 WHEREAS Plaintiffs and Federal Defendants have reached an agreement to
6 resolve this case, with the Parties agreeing to undertake and perform the measures set
7 forth in this Stipulated Settlement Agreement;

8 THEREFORE, pursuant to Federal Rule of Civil Procedure 41, Plaintiffs and
9 Federal Defendants stipulate and agree as follows:

10 1. The Forest Service will inspect, maintain, and repair the reconstructed and
11 otherwise completed sections of the 19-mile boundary fence between the Fort Apache
12 Indian Reservation to the west and the Apache-Sitgreaves National Forest to the east, as
13 depicted in Attachment A, consistent with the provisions in this paragraph and for the
14 term of this Stipulated Settlement Agreement. The Forest Service will inspect
15 approximately 3 miles of these sections of the 19-mile boundary fence every month
16 during the grazing season (May 15 to October 15), weather and conditions permitting,
17 rotating through different areas and portions of fencing each month. Repairs that the
18 Forest Service identifies as being needed during these inspections will be made as soon as
19 staffing, funding, and resources are available. The Forest Service will prioritize these
20 repairs to the extent possible given other Forest needs and obligations. The Forest
21 Service agrees to maintain a list of needed repairs and will provide that list upon request
22 to Plaintiffs.

23 2. The Forest Service will prepare monthly reports to document any
24 inspections and repairs that were made regarding the boundary fencing addressed in (1)
25 above. The Forest Service will post these inspection reports online and ensure that each
26 report is signed by a Forest Service employee with supervisory authority.
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1 3. The Forest Service will inspect existing riparian fencing and exclosures for
2 which it is responsible within New Mexico meadow jumping mouse critical habitat in the
3 Black River watershed on the Apache-Sitgreaves National Forest as depicted in
4 Attachment A (East Fork of the Lower Colorado River Elk Exclosures, Boggy Creek
5 Experimental Plots, Boggy Creek Cattle Exclosure, Boggy Creek Elk Exclosure,
6 Centerfire Creek Cattle and Elk Exclosures, West Fork Black River Crossing Exclosure,
7 PS_Grandfather Fence). The Forest Service agrees to conduct these inspections at least
8 monthly between May 15 and October 15, weather and conditions permitting, with the
9 understanding that inspections will rotate through different areas and portions of fencing
10 each month. When horses or cattle are found within the existing exclosures, the Forest
11 Service will work to remove the horses or cattle from the exclosures within 14 days and
12 make any needed repairs as soon as staffing, funding, and resources are available.

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14 4. The commitments made by the Forest Service in Paragraphs 1-3 will
15 commence on the date that this agreement is approved by the Court, and extend for a
16 period of two years from that date.

17 5. The United States Fish and Wildlife Service will submit a notice of
18 availability of the Draft Recovery Plan for the New Mexico meadow jumping mouse to
19 the Federal Register and post it on the Fish and Wildlife Service website no later than
20 January 31, 2022, and will complete the Final Recovery Plan for the jumping mouse and
21 post it on the Fish and Wildlife Service website by January 31, 2023.

22 6. Attorneys' Fees and Costs.

23 a. Federal Defendants agree to pay Plaintiffs \$28,000.00 in full and
24 complete satisfaction of any and all claims, demands, rights, and causes of action
25 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), ESA Section
26 11(g)(4), 16 U.S.C. § 1540(g)(4), and/or any other statute and/or common law theory, for
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1 any and all attorneys' fees and costs incurred in this litigation through the date of
2 dismissal of the action pursuant to Paragraph 7.

3 b. Federal Defendants' payment as identified in Paragraph 6.a above,
4 shall be accomplished by electronic fund transfer into the Center for Biological Diversity.
5 Plaintiffs' counsel will provide the appropriate account number, tax identification, and
6 other information needed to facilitate payment to undersigned counsel for Federal
7 Defendants. Federal Defendants shall submit the paperwork for the payment within
8 thirty (30) business days after this Stipulated Settlement Agreement is approved by the
9 Court or Plaintiffs provide the necessary information as required by this paragraph to
10 facilitate the payment, whichever is later. Plaintiffs' counsel shall notify undersigned
11 counsel for Federal Defendants when payment is received.
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13 c. Plaintiffs agree that receipt of the full amount specified in Paragraph
14 6.a above shall operate as a release of any and all claims for attorneys' fees and costs that
15 Plaintiffs have incurred in this litigation through the date of dismissal of the action
16 pursuant to Paragraph 7.

17 d. Plaintiffs and their attorneys agree to hold harmless Federal
18 Defendants in any litigation, further suit, or claim arising from the payment of the
19 agreed-upon \$28,000.00 settlement amount pursuant to Paragraph 6.a. Under 31 U.S.C.
20 §§ 3711, 3716; 26 U.S.C. § 6402(d); 31 C.F.R. §§ 285.5, 901.3; and other authorities, the
21 United States will offset against the attorney fee award Plaintiffs' delinquent debts to the
22 United States, if any. *See Astrue v. Ratliff*, 560 U.S. 586 (2010).

23 7. Plaintiffs dismiss this action with prejudice, except as to their First and
24 Third Claims for Relief, pursuant to Rule 41 of the Federal Rules of Civil Procedure.
25 Plaintiffs dismiss their First and Third Claims for Relief, regarding Section 7 of the
26 Endangered Species Act, 16 U.S.C. § 1536, without prejudice.
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1 8. In the event there is a dispute over compliance with any term or provision
2 of this Stipulated Settlement Agreement, the disputing Party will notify the other Party in
3 writing of the nature of the dispute and, within 7 days after such notification, the Parties
4 will discuss and attempt to resolve the dispute. If the Parties do not resolve the dispute
5 within 15 days thereafter, Plaintiffs have the option of filing a new case. Through this
6 Agreement, Federal Defendants do not waive any jurisdictional, procedural, or
7 substantive defenses to any new cases. The Parties agree not to seek to invoke the
8 contempt powers of this Court in aid of enforcement of this Agreement.

9 9. The undersigned representatives of Plaintiffs and Federal Defendants
10 certify that they are fully authorized by the Party or Parties whom they represent to enter
11 into the terms and conditions of this Stipulated Settlement Agreement and to legally bind
12 those Parties to it.

13 10. Nothing in this Stipulated Settlement Agreement shall be interpreted as, or
14 shall constitute, a commitment or requirement that Federal Defendants obligate or pay
15 funds, or take any other actions in contravention of the Anti-Deficiency Act, 31 U.S.C. §
16 1341, or any other applicable law. Nothing in this Stipulated Settlement Agreement shall
17 be construed to deprive a federal official of authority to revise, amend or promulgate
18 regulations, or to amend or revise land and resource management plans. Nothing in this
19 Stipulated Settlement Agreement is intended to or shall be construed to amend or require
20 amendment of the Forest Plan for the Apache-Sitgreaves National Forest; to waive any
21 obligation to exhaust administrative remedies; to constitute an independent waiver of the
22 United States' sovereign immunity; to change the standard of judicial review of federal
23 agency actions under the Administrative Procedure Act ("APA"); or to otherwise extend
24 or grant this Court jurisdiction to hear any matter, except as expressly provided in the
25 Stipulated Settlement Agreement.
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1 11. It is hereby expressly understood and agreed that this Stipulated Settlement
2 Agreement was jointly drafted by Plaintiffs and Federal Defendants. Accordingly, the
3 Parties hereby agree that any and all rules of construction, to the effect that ambiguity is
4 construed against the drafting Party, shall be inapplicable in any dispute concerning the
5 terms, meaning, or interpretation of the Stipulated Settlement Agreement.

6 12. This Stipulated Settlement Agreement contains all of the agreements
7 between Plaintiffs and Federal Defendants, and is intended to be and is the final and sole
8 agreement between the Parties concerning the complete and final resolution of Plaintiffs'
9 claims. Plaintiffs and Federal Defendants agree that any other prior or contemporaneous
10 representations or understandings not explicitly contained in this Stipulated Settlement
11 Agreement, whether written or oral, are of no further legal or equitable force or effect.
12 Any subsequent modifications to this Stipulated Settlement Agreement must be in
13 writing, and must be signed and executed by Plaintiffs and Federal Defendants.

14 13. This Stipulated Settlement Agreement is the result of compromise and
15 settlement, and does not constitute an admission, implied or otherwise, by Plaintiffs or
16 Federal Defendants to any fact, claim, or defense on any issue in this litigation. This
17 Stipulated Settlement Agreement has no precedential value and shall not be cited in any
18 other litigation.

19 14. The Parties understand that notwithstanding their efforts to comply with the
20 commitments contained herein, events beyond their control may prevent or delay such
21 compliance. Such events may include natural disasters as well as unavoidable legal
22 barriers or restraints, including those arising from actions of persons or entities that are
23 not party to this Stipulated Settlement Agreement. Force majeure shall not continue
24 beyond the circumstances and conditions that prevent timely performance, and shall not
25 apply if alternative means of compliance are available. The Party claiming force majeure
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1 shall have the burden of proof in proceedings to enforce or modify the Stipulated
2 Settlement Agreement.

3 15. This Stipulated Settlement Agreement contains all of the agreements
4 between the Parties, and is the final and sole agreement between the Parties regarding this
5 dispute. None of the provisions or obligations of this Stipulated Settlement Agreement
6 shall become effective and binding unless and until the Court enters its approval.
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8 Respectfully submitted on March 17, 2021.
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10 /s/ Mark D. Fink (electronic approval 3/17/21)

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28 /s/ Andrew A. Smith

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